STATE OF MICHIGAN

COURT OF APPEALS

JEANNE SMITH,

Plaintiff-Appellant,

v

ASPHALT SPECIALISTS, INC., and DANIEL ISRAEL,

Defendants-Appellees.

UNPUBLISHED
October 17, 1997

No. 190555
Oakland Circuit Court
LC No. 94-474697-NO

Before: Markman, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

In this sexual harassment case, plaintiff appeals as of right the order of the Oakland Circuit Court granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7), (8), and (10). We affirm.

Defendant Daniel Israel, his brother Bruce Israel, and plaintiff's husband, Gary Smith, each owned one-third of defendant Asphalt Specialists, Inc. Plaintiff began working for her husband's business in March, 1988, in a clerical position. Soon thereafter, plaintiff became responsible for handling the accounts payable, payroll, and health insurance benefits. In December, 1990, plaintiff's husband, Gary Smith, informed Daniel and Bruce Israel that he wanted them to buy out his share of the corporation. The process of buying out Smith's share of the corporation resulted in litigation. Plaintiff alleges that, throughout the remainder of her employment at Asphalt Specialists, Inc., she was sexually harassed by Daniel Israel, which resulted in a hostile work environment.

Plaintiff alleged, and submitted evidence of, numerous offensive comments made to and about her by Daniel Israel throughout her employment.[1] On December 11, 1990, plaintiff was laid off by defendants, but was called back to work on April 1, 1991. Plaintiff alleged that Daniel Israel continued to sexually harass her after she returned to work. First, plaintiff asserts that when she returned to work, she was not returned to her former job responsibilities but was given a new job description which included mainly "meaningless busywork tasks." Second, plaintiff asserts that during her last week of work in April, 1991, Daniel Israel told her that she was "still a bitch," and to "figure this f'ing account

out." Finally, plaintiff asserts that, on April 12, 1991, Daniel Israel looked in her direction and stated that she was "looking real good," in what she perceived as a sexual manner. On April 19, 1991, plaintiff left her employment with defendants, allegedly in response to Daniel Israel's conduct.

Plaintiff filed a complaint on April 11, 1994 alleging assault and battery, wrongful discharge, sexual harassment based on a hostile work environment, invasion of privacy, and intentional infliction of emotional distress. Plaintiff thereafter consented to dismissal of her assault and battery and wrongful discharge claims. Subsequently, the trial court granted summary disposition of the intentional infliction of emotional distress claim pursuant to MCR 2.116(C)(8) and (10), the invasion of privacy claims pursuant to MCR 2.116(C)(7) and (10), and the sexual harassment claim pursuant to MCR 2.116(C)(7) and (10).

Plaintiff first argues that the trial court erred in granting summary disposition of her sexual harassment claim. The Civil Rights Act, MCL 37.2101, *et seq.*; MSA 3.548(101), *et seq.*, provides that "[a]n employer shall not . . . discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . sex." MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). The act broadly defines sexual discrimination to include sexual harassment:

> Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:
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> * * *
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> (*iii*) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment. [MCL 37.2103(i)(*iii*); MSA 3.548(103)(i)(*iii*).]

To prove a claim of sexual harassment based on a hostile work environment, a plaintiff must establish that

> 1) the employee belonged to a protected group, 2) the employee was subjected to communication or conduct on the basis of sex, 3) the employee was subjected to unwelcome sexual conduct or communication, 4) the unwelcome sexual conduct or communication was intended to or did in fact substantially interfere with the employee's employment or create an intimidating, hostile, or offensive work environment, and 5) respondeat superior. [*Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

An employment discrimination claim is subject to a three year statute of limitation, MCL 600.5805(8); MSA 27A.5805(8), which deadline was not satisfied by plaintiff except with regard to the three incidents allegedly occurring in April 1991 after plaintiff was called back to work. However,

the continuing violations doctrine allows recovery for incidents outside the limitation period, where an employee challenges a series of allegedly discriminatory acts so sufficiently related as to constitute a pattern and at least one of the acts occurred within the limitation period.[2] *Sumner v The Goodyear Tire & Rubber Co*, 427 Mich 505, 538-539; 398 NW2d 368 (1986); *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343-345; 483 NW2d 407 (1992). Factors to be considered in determining whether timely and untimely incidents of harassment constitute a continuing violation include whether they involve the same type of discrimination, the frequency of the incidents, and "especially" whether the incidents have the "degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights." *Sumner*, *supra* at 538. Here, the alleged incidents that predated the limitation period were clearly sufficient by themselves to trigger plaintiff's awareness that she might be able to pursue a legal remedy. Plaintiff herself testified that Daniel Israel's conduct prior to the limitation period "hurt" her and that she was "fearful" of him. Plaintiff could have timely pursued a sexual harassment claim regarding these incidents. Under such circumstances, a party may not sit on their rights and later recover for the untimely incidents by simply arguing that they are somehow connected to a later timely incident. The present matter is readily distinguishable from *Meek*, *supra* at 345, in which this court found that the plaintiff reasonably chose not to timely assert her alleged claims because she regularly changed supervisors and reasonably believed that, with each managerial change, the discriminatory conduct would cease. Here, in contrast, all of plaintiff's allegations relate to the same supervisor; there is no reasonable excuse for her failure to timely assert her sexual harassment claim with respect to conduct that predates the limitation period at issue. Accordingly, the third factor for determining whether a continuing violation exists weighs against plaintiff. Additionally, the indefiniteness of plaintiff's testimony regarding when the alleged conduct that predates the limitation period occurred and the substantial time lapse between these untimely allegations and the timely allegations (caused by plaintiff's four month lay-off), indicate a disconnectedness and lack of frequency in the alleged harassing conduct, and make the first and second factors weigh against plaintiff as well. Accordingly, we conclude that plaintiff failed to establish a continuing violation here and therefore will consider only the three incidents that allegedly occurred within the limitation period.

Here, the trial court granted summary disposition of plaintiff's sexual harassment claim based on this Court's holding in *Koester v City of Novi*, 213 Mich App 653, 667-670; 540 NW2d 765 (1995), that a sexual harassment claim under the Civil Rights Act must be supported by evidence of overtly sexual conduct or communication, and that mere gender-based conduct or communication was insufficient to support such a claim. However, the Michigan Supreme Court has expressly stated that a plaintiff in a sexual harassment case need not allege conduct or communication of a sexual nature, but need only show that "but for the fact of her sex, she would not have been the subject of harassment." *Radtke*, *supra*, at 383. See also *Malan v General Dynamics Land Systems, Inc*, 212 Mich App 585, 587; 538 NW2d 76 (1995). However, we need not resolve the viability of *Koester* because the only allegation here that arguably constitutes sexual harassment was also arguably overtly sexual.

Two of the alleged timely incidents --giving plaintiff work beneath her abilities and the use of coarse language in addressing plaintiff-- simply fail to meet the threshold requirement of being "subjected to communication or conduct on the basis of sex." Defendant's sex was altogether incidental with regard to these incidents. *Radtke*, *supra* at 382. Thus, the only alleged conduct before us in

determining whether summary disposition of plaintiff's sexual harassment claim is proper is the incident in which Daniel Israel allegedly came out to the garage where plaintiff was working, looked toward her and told her that she was "looking real good," in what she perceived to be a sexually suggestive manner. "[G]enerally, a single incident of sexual harassment will not create a hostile work environment"; however, one "extremely traumatic experience," e.g., rape or sexual assault, may fulfill the statutory requirement. *Id*. at 395. Here, the single incident alleged does not, in our judgment, alone rise to the level of creating a hostile work environment. Accordingly, we conclude that the trial court properly granted summary disposition of plaintiff's sexual harassment claim.

Plaintiff next argues that the trial court erred in granting summary disposition of her claim for intentional infliction of emotional distress. In *Roberts v Auto-Owners Insurance Company*, 422 Mich 594, 611; 374 NW2d 905 (1985), the Court declined to decide whether this state should recognize the tort of intentional infliction of emotional distress, holding that the plaintiffs in that case failed to present a prima facie case of such a claim and, therefore, that such a determination was not necessary to the case before it. However, this Court has repeatedly recognized the tort of intentional infliction of emotional distress. *Grochowalski v Detroit Automobile Inter-Insurance Exchange*, 171 Mich App 771, 775-776; 430 NW2d 822 (1988).

To establish a claim of intentional infliction of emotional distress, a plaintiff must prove "(1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). Liability for this claim is found only where the conduct complained of is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Doe*, *supra*, at 91. Liability will not be found for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Id*. The period of limitation applicable to a claim of intentional infliction of emotional distress is three years. MCL 600.5805(8); MSA 27A.5805(8). Here, plaintiff failed to present evidence of any conduct by defendants occurring within the statute of limitations period which could be considered extreme or outrageous. Accordingly, defendants were entitled to summary disposition of plaintiff's intentional infliction of emotional distress claim.

Next, plaintiff argues that the trial court erred in granting summary disposition of her invasion of privacy claims. The tort of invasion of privacy is based on a common law right to privacy, which protects against four types of invasion of privacy: 1) intrusion upon a plaintiff's seclusion, solitude, or private affairs, 2) public exposure of embarrassing facts about the plaintiff, 3) publicity that places the plaintiff in a false light, and 4) appropriation of the plaintiff's name or likeness to the defendant's advantage. *Doe*, *supra*, at 79-80. Plaintiff alleged that defendants invaded her privacy by intruding into her seclusion, solitude, and private affairs, and by disclosing private, embarrassing facts about her to the public. To establish a prima facie case of invasion of privacy based on intrusion upon seclusion, a plaintiff must establish "(1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable person." *Id*. at 88. An action for intrusion upon one's privacy focuses on the manner in which information is obtained, rather than its publication, and such an action does not exist where the plaintiff is merely offended by the fact of disclosure, rather

than the method by which the information disclosed has been obtained. *Id*. at 88-89. The period of limitation applicable to a claim of invasion of privacy is three years. MCL 600.5805(8); MSA 27A.5805(8). Here, plaintiff failed to allege any instances in which defendants intruded into her privacy within the limitation period. Further, while plaintiff complains of the actual disclosure of certain information by Daniel Israel, she did not allege that the information was obtained improperly. *Doe*, *supra*, at 88. Accordingly, the trial court properly granted summary disposition of plaintiff's intrusion upon privacy claim. Similarly, plaintiff failed to allege any instances of public disclosure of private, embarrassing facts occurring within the limitation period. Therefore, the trial court's grant of summary disposition of that claim was proper.

Finally, plaintiff argues that the trial court abused its discretion in denying her motion *in limine* to exclude the testimony of witness Kathryn Carsons as irrelevant and in denying her motion *in limine* to exclude the testimony of defendants' four rebuttal witnesses. Because we affirm the order granting summary disposition, we need not address these issues.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald

[1] Plaintiff alleges numerous incidents of inappropriate conduct by Daniel Israel that occurred before her December 1990 lay off. As discussed below, this conduct was clearly sufficient to trigger plaintiff's awareness that she could pursue a legal remedy, however plaintiff did not file an action based on this alleged conduct within the statute of limitation. Because we conclude that this alleged conduct is not part of a continuing violation, we need not lay out plaintiff's specific allegations relating to this time period.

[2] Presumably, under this doctrine, a plaintiff can establish a sex harassment violation on the basis of occurrences that happened well outside the statute of limitations if at least one of the acts constituting the claim occurred within the statute.